A

Malaysian Motor Insurance Pool (administered by MMIP Services Sdn Bhd) v Murali a/l Sandrakasan & Anor

B

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCVC-5–01 OF 2019
MOHD FIRUZ J
6 APRIL 2021

C

Tort — Negligence — Professional negligence — Plaintiff sued defendants as plaintiff's solicitors for professional negligence — Whether the defendants were negligent in handling the suit — Whether the defendants had breached the retainer — Whether the defence of limited immunity was applicable

D

Tort — Causation — Factual causation — Whether the chain of causation was broken — Whether the defendants negligent acts had caused the plaintiff's losses

E

Civil Procedure — Pleadings — Failure to plead — Whether there was a failure to plead factual allegations

Contract Law — Breach — Retainer — Whether the defendants had breached the retainer

F

The plaintiff was a company providing insurance coverage for motor vehicles. The first defendant was a partner of the legal firm of Messrs Jayadeep, Hari & Jamil, the second defendant. The plaintiff's cause of action against the defendants was for professional negligence and breach of retainer. At the material time, the second defendant was on the plaintiff's panel of solicitors. The plaintiff had appointed the second defendant to act for one Saiful bin Sapuan ('Saiful'), the defendant in Seremban Sessions Court Suit No A53KJ-502–12 of 2016 ('the Seremban Suit'). The plaintiff in the Seremban Suit, Syamsul Azli bin Nazari ('Syamsul'), commenced an action against Saiful for a personal injuries claim arising out of a motor vehicle accident. Saiful's vehicle was insured by the plaintiff herein. At the end of the Seremban Suit, Syamsul's claim against Saiful was allowed by the sessions court judge. The damages were then assessed in the amount of RM4,999,309. It was the plaintiff's case that the first defendant, being a partner in the second defendant had conducted the case in the sessions court negligently and in breach of the terms of the retainer, thus necessitating the sessions court to hold Saiful 100% liable. The plaintiff further alleged that, in respect of quantum of damages assessed awarded by the sessions court, Syamsul did not or did not sufficiently

G

H

I

prove the quantum in respect of costs of care. Rather it was the first defendant who had called a witness to prove the quantum of costs of care and led to the sessions court's award of RM4,999,309 against Saiful. The plaintiff further alleged that the defendants were negligent in failing to file the appeal records in the High Court within time. As a result, the plaintiff had to engage another firm of solicitors, the Chambers of Shanta Mohan ('CSM'), to take over conduct of the appeal in the High Court from the second defendant, to mitigate its loss. The issues that arose before the learned High Court judge were: (a) the factual allegations that were not pleaded; (b) the breaches related to non-compliance of the service level agreement ('SLA'); and (c) the breaches related to the handling of the Seremban Suit.

Held, dismissing the plaintiff's claim with costs:

(1) It was the plaintiff's allegation that the defendants failed to object to the investigating officer ('IO') giving evidence by referring to the investigation results which stated that Saiful was summoned or convicted under s 43(1) of the Road Transport Act; and that the defendants failed to adduce evidence on the nursing care quotation obtained by the defendants for the purposes of comparison with the nursing care quotation from Columbia Hospital. The court found that the plaintiff did not plead those two breaches in the statement of claim. It was a cardinal principle of litigation that parties were bound by its pleadings (see paras 41–42).

(2) Under the SLA, the defendants owed the plaintiff a duty of care and the defendant's failures amount to a breach of that duty of care. However, the court was unable to conclude that the defendants failures had caused harm or damage to the defendant. The acts of the defendants had no nexus with the damage suffered by the plaintiff. The plaintiff themselves failed to take note of the trial date to revert to the defendant's request for mandate for settlement purposes. In fact, the defendants act in filing the notice of appeal against the sessions court decision albeit without instructions from the plaintiff was favourable and in the interest of the plaintiff. It led to the plaintiff withdrawing their allegation on the matter on the very first day of trial (see paras 45–47).

(3) Whilst there was a failure by the defendants to serve the notice of appeal and record of appeal within time, the failure was not deliberate as it was due to an error on the part of the clerk in charge of the matter. This did not cause the plaintiff's loss. Secondly, the plaintiff's decision to compromise the Seremban Suit was based on the advice of CSM that the chances of succeeding in obtaining leave to file the notice of appeal and appeal record out of time were slim and the court was of the view that the advice given by CSM was not entirely correct. Thirdly, based on the testimony of PW2, to say that the application for extension of time filed

in the Seremban Suit was hopeless simpliciter as put by the plaintiff and therefore they had to compromise the Seremban Suit was wrong (see para 49).

(4) Given the background that the plaintiff themselves agreed that there were merits in the appeal and that the delay in serving the notice of appeal and appeal record was only a mere number of days, it was the plaintiff's own decision to compromise the suit that led to it suffering the loss of RM4m. The situation might have however been different had the plaintiff chosen to proceed with the said application for extension of time and loss. The chain of causation in so far as the losses suffered by the plaintiff had been broken by the compromise of the Seremban Suit. The court did not agree with the plaintiff's contention that the negligence of the defendants had caused them a loss of chance to ventilate their case at the appeal stage. The learned High Court judge therefore held that the plaintiff had failed to prove their case on a balance of probability (see paras 50 & 62).

[Bahasa Malaysia summary

Plaintif adalah syarikat yang menyediakan perlindungan insurans untuk kenderaan motor. Defendan pertama adalah rakan kongsi firma guaman Tetuan Jayadeep, Hari & Jamil, defendan kedua. Kausa tindakan plaintif terhadap defendan-defendan adalah untuk kecuaian profesional dan pelanggaran retainer. Pada masa matan, defendan kedua berada daam panel peguam cara plaintif. Plaintif telah melantik defendan kedua untuk bertindak bagi Saiful bin Sapuan (Saiful'), defendan di Mahkamah Sesyen Seremban Saman No A53KJ-502–12 Tahun 2016 ('Guaman Seremban'). Plaintif dalam Guaman Seremban itu, Syamsul Azli bin Nazari ('Syamsul'), telah memulakan tindakan terhadap Saiful untuk tuntutan kecederaan peribadi yang timbul daripada kemalangan kenderaan motor. Kenderaan Saiful diinsuranskan oleh plaintif. Di akhir Guaman Seremban itu, tuntutan Syamsul terhadap Saiful dibenarkan oleh hakim mahkamah sesyen. Ganti rugi kemudian ditaksir berjumlah RM4,999,309. Ia adalah kes plaintif bahawa defendan pertama, sebagai rakan kongsi dalam defendan kedua telah mengendalikan kes di mahkamah sesyen dengan cuai dan melanggar syarat retainer, dengan itu memerlukan mahkamah sesyen memutuskan Saiful bertanggungjawab 100%. Selanjutnya plaintif mengatakan bahawa, berkaitan kuantum ganti rugi yang ditaksir dan telah diawardkan oleh mahkamah sesyen, Syamsul tidak atau tidak mencukupi membuktikan kuantum berkaitan kos penjagaan. Sebaliknya ia adlaah defendan pertama yang telah memanggil saksi untuk membuktikan kuantum kos penjagaan dan membawa kepada award mahkamah sesyen berjumlah RM4,999,309 terhadap Saiful. Selanjutnya plaintif mengatakan bahawa defendan cuai kerana gagal memfailkan rekod rayuan dalam had masa di Mahkamah Tinggi. Akibatnya, plaintif telah melantik firma peguam cara lain, Chambers of Shanta Mohan ('CSM'), untuk mengambil alih pengendalian rayuan di Mahkamah Tinggi daripada defendan kedua, untuk

mengurangkan kosnya. Isu-isu yang timbul di hadapan hakim Mahkamah Tinggi yang bijaksana adalah: (a) dakwaan faktual yang tidak dipli; (b) pelanggaran berkaitan ketidakpatuhan perkjanjian tahap perkhidmatan ('PTP'); dan (c) pelanggaran berkaitan pengendalian Guaman Seremban.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Dakwaan plaintif adalah bahawa defendan telah gagal untuk membantah pegawai penyiasat ('IO') yang memberikan keterangan dengan merujuk kepada hasil penyiasatan yang menyatakan bahawa Saiful disaman atau disabitkan di bawah s 43(1) Akta Pengangkutan Jalan Raya; dan bahawa defendan telah gagal mengemukakan keterangan berhubung sebut harga penjagaan kejururawatan dari Hospital Columbia. Mahkamah mendapati bahawa plaintif tidak mempli dua pelanggaran tersebut dalam pernyataan tuntutan. Ia dalah prinsip utama dalam litigasi bahawa pihak-pihak adalah terikat dengan plidingnya (lihat perenggan 41–42).

(2) Di bawah PTP, defendan-defendan mempunyai kewajipan berjaga-jaga terhadap plaintif dan kegagalan defendan merupakan pelanggaran kewajipan berjaga-jaga itu. Walau bagaimanapun, mahkamah tidak boleh membuat kesimpulan bahawa kegagaln defendan telah menyebabkan bahaya atau kerosakan kepada defendan. Tindakan defendan tiada kaitan dengan kerosakan yang dialami oleh plaintif. Plaintif sendiri telah gagal mengambil perhatian mengenai tarikh perbicaraan untuk kembali kepada permintaan mandat defendan untuk tujuan penyelesaian. Bahkan, tindakan defendan memfailkan notis rayuan terhadap keputusan mahkamah sesyen walaupun tanpa arahan daripada plaintif adalah baik dan demi kepentingan plaintif. Ia membawa kepada plaintif menarik balik dakwaan mereka berhubung hal perkara pada hari pertama perbicaraan (lihat perenggan 45–47).

(3) Walaupun ada kegagalan oleh defendan untuk menyampaikan notis rayuan dan rekod rayuan dalam had masa, kegagalan itu tidak disengajakan kerana ia disebabkan kesilapan di pihak kerana yang bertugas untuk hal perkara itu. Ini tidak menyebabkan kerugian plaintif. Keduanya, keputusan plaintif berkompromi dengan Guaman Seremban adalah berdasarkan nasihat CSM bahawa peluang untuk berjaya dalam memperoleh kebenaran untuk memfailkan notis rayuan dan rekod rayuan di luar had masa adalah tipis dan mahkamah berpandangan bahawa nasihat yang yang diberikan oleh CSM tidak betul sepenuhnya. Ketiga, berdasarkan testimoni PW2, untuk mengatakan bahawa permohonan lanjutan masa difailkan dalam Guaman Seremban adalah pemudah yang tiada harapan sepertimana dinyatakan oleh plaintif dan dengan itu mereka perlu berkompromi yang Guaman Seremban itu adalah salah (lihat perenggan 49).

(4) Berdasarkan latar belakang bahawa plaintif sendiri telah bersetuju

terdapat merit dalam rayuan dan bahawa kelewatan dalam menyampaikan notis rayuan dan rekod rayuan hanyalah beberapa hari sahaja, ia adalah keputusan plaintif sendiri untuk berkompromi dengan saman itu yang membawa kepadanya mengalami kerugian RM4 juta. Keadaan mungkin berbeza jika plaintif memilih untuk meneruskan dengan permohonan tersebut bagi lanjutan masa dan kerugian. Rantaian kausa setakat mana kerugian dialami oleh plaintif terputus oleh kompromi Guaman Seremban itu. Mahkamah tidak bersetuju dengan hujah plaintif bahawa kecuaian defendan telah menyebabkan mereka hilang peluang untuk meneruskan kes mereka di peringkat rayuan. Hakim Mahkamah Tinggi yang bijaksana memutuskan bahawa plaintif telah gagal membuktikan kes mereka atas imbangan kebarangkalian (lihat perenggan 50 & 62).]

Cases referred to

Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals [2003] 1 MLJ 567, CA (refd)
Atwells v Jackson Lalic Lawyers Pty Limited [2016] HCA 16, HC (refd)
Cheong Yeo & Parter & Anor v Guan Ming Hardware & Engineering Pte Ltd [1997] 2 SLR 30, CA (refd)
D'Orta-Ekenaike v Victoria Legal Aid (2005) 214 ALR 92, HC (refd)
Hall (Arthur JS) & Co v Simons [2002] 1 AC 615, HL (refd)
Innoseal (M) Sdn Bhd v Messrs Nora SW Lam & Associates & Anor [2016] MLJU 515, HC (refd)
Kong Thai Sawmill (MIRI) Sdn Bhd; Ling Beng Sung v Kong Thai Sawmill (MIRI) Sdn Bhd & Ors (No 2) [1976] 1 MLJ 131, FC (refd)
Lai v Chamberlains [2007] 2 NZLR 7, HC (refd)
Menah Sulong v Lim Soo & Anor [1983] 1 CLJ 26, FC (refd)
Messrs Shahinudin & Ranjit v Ravichantiran a/l Ganesan [2020] MLJU 846, HC (refd)
Mohd Noor Dagang Sdn Bhd v Tetuan Mohd Yusof Endut [2001] 5 MLJ 561, HC (refd)
Mount v Barker Austin [1998] EWCA Civ 277 (refd)
Nyo Nyo Aye v Kevin Sathiaseelan a/l Ramakrishnan & Anor [2020] 4 MLJ 380; [2020] 3 AMR 317, CA (refd)
Rondel v Worsley [1967] 1 QB 443, HL (refd)
Saif Ali & Anor v Sydney Mitchell & Co (a firm) & Ors [1980] AC 198, HL (folld)
See Leong Chye @ Sze Leong Chye & Anor v United Overseas Bank Bhd [2019] 1 MLJ 25, FC (refd)
Singapore Shooting Association and others v Singapore Rifle Association [2019] SGCA 83, CA (refd)
Sri Alam Sdn Bhd v Tetuan Radzuan Ibrahim & Co (sued as a firm) [2010] 1 MLJ 284, HC (refd)

Tembusu Growth Fund Ltd v ACTAtek, Inc and others [2018] 4 SLR 1213, HC (refd)
Tenaga Nasional Berhad v Prorak Sdn Bhd [2000] 1 MLJ 479, CA (refd)
Tong Kim Soo v Torai Prospektif Sdn Bhd [2019] MLJU 946, CA (refd)
Wright v Paton Farrell [2007] PNLR 7 (refd)

Legislation referred to

Road Transport Act 1987 s 43(1)
Human Rights Act 1998 [UK]

(Gunaseelan & Assoc) for the plaintiff.
Wong Hok Mun (Koh Pei Siah with him) (Azim, Tunku Farik & Wong) for the defendants.

Mohd Firuz J:

[1] The following is the court's decision and the end of a full trial between the parties. In total there were only three witnesses called, two by the plaintiff and one by the defendant.

INTRODUCTORY FACTS

[2] The plaintiff is a company providing insurance coverage for motor vehicles and is administrated by MMIP Services Sdn Bhd having registered address at 6th floor, Bangunan Malaysian RE, No 17, Lorong Dungun, Damansara Heights, 50490 Kuala Lumpur.

[3] The first defendant at the material time was a partner of the legal firm of Messrs Jayadeep, Hari & Jamil, the second defendant.

[4] The plaintiff's cause of action against the defendants is for professional negligence and breach of retainer. At the material time, the second defendant was on the plaintiff's panel of solicitors. In this regard, the plaintiff had appointed the second defendant to act for the Saiful bin Sapuan ('Saiful'), the defendant in Seremban Sessions Court Suit No A53KJ-502–12 of 2016 (the Seremban Suit').

[5] The plaintiff in the Seremban Suit was one Syamsul Azli bin Nazari ('Syamsul') commenced an action against Saiful for a personal injuries claim arising out of a motor vehicle accident. Saiful's vehicle was insured by the plaintiff herein.

[6] At the end of the Seremban Suit, Syamsul's claim against Saiful was allowed by the sessions court judge. Damages was then assessed in the amount of RM4,999,309.

[7] It is the plaintiff's case that the first defendant, being a partner in the second defendant had conducted the case in the sessions court negligently and in breach of the terms of the retainer.

[8] The plaintiff alleged the first defendant had acted in breach of the retainer and conducted the case negligently, thus necessitating the sessions court to hold that Saiful, 100% liable.

[9] The plaintiff further alleges that, in respect of quantum of damages assessed awarded by the sessions court, Syamsul did not or did not sufficiently prove the quantum in respect of costs of care. Rather it was the first defendant who had called a witness to prove the quantum of costs of care. This led to the sessions court awarded the sum of RM4,999,309 against Saiful.

[10] The plaintiff further alleges that the first and/or the second defendants were negligent in failing to file that the appeal records in the High Court within time. As a result, the plaintiff had to engage another firm of solicitors, the Chambers of Shanta Mohan ('CSM'), to take over conduct of the appeal in the High Court from the second defendant, to mitigate its loss.

[11] Due to the negligence and breach of retainer by the defendants, the plaintiff claims for the following:

(a) RM4m being the sum paid by the plaintiff in the Seremban Suit;

(b) the sum of RM 57,871.22 being legal fees paid to the CSM for taking over conduct of the matter from the second defendant;

(c) interest at the rate of 5%pa on the judgment sum from 3 January 2019 (being the date of the writ) to the day of full realisation of the judgment sum;

(d) cost of this action; and

(e) further or other reliefs.

Summary of the defendant's case

[12] At the material point in time, the first defendant was the sole advocate & solicitor who had charge of the Seremban Suit. He resigned from the second defendant on 6 September 2017.

[13] By a written advice dated 26 April 2017, the first defendant proffered a preliminary opinion to the plaintiff on both issues of liability and quantum in the underlying suit premised on the available evidence/material available to the first defendant at that time. The preliminary advice proffered was that liability may be apportioned 50/50 and that quantum be RM1,462,569.33. The issues of liability and quantum in the underlying suit were inherently fact sensitive and also dependent upon the subjective appraisal and/or assessment of the trial judge.

[14] The defendants received no mandate and response of any nature from the plaintiff whether in regard to the preliminary opinion dated 26 April 2017 and/or the memoranda dated 26 May 2017 and/or the revised opinion dated 16 June 2017 (all three asking and/or reminding the plaintiff for a mandate) or at all throughout the course of the underlying suit. Apart from the appointment of the defendants, there were no written communication/instructions from the plaintiff to the defendants at all until after judgment was entered in the Seremban Suit on 1 August 2017.

[15] The defendants contend that in light of the fact that the insured was convicted under s 43(1) of the Road Transport Act 1987 for the accident resulting in the underlying suit, the judgment pronounced by the Seremban Sessions Court cannot be said to have been caused by any shortcomings on the part of the defendants. Further and/or in the alternative, the plaintiff's purpose and/or business is to insure 'high risk' drivers/vehicles whose applications for insurance have been rejected by the community of licensed general insurance companies of whom the insured is one.

[16] The plaintiff's plea is respect of the alleged breaches of retainer (which are denied) are misconceived as the alleged breaches did not cause the plaintiff any loss and/or that the alleged breaches were committed by the first defendant alone in his capacity as advocate/counsel for which he can bear no liability and that:

(a) in failing to update the plaintiff within two working days of the trial on 2 June 2017 and 20 June 2017, the defendants cannot be said to have caused the plaintiffs any loss as this had no impact whatsoever on the outcome of the Seremban Suit. In any case, the plaintiff was well aware of the trial dates and had been twice advised previously as to both liability and quantum;

(b) the plaintiff's own adjusters report dated 30 December 2016 and 20 June 2017 state that the plaintiff in the Seremban Suit was actually warded at Columbia Extended Care Hospital. The award for nursing care was premised on this fact. Further, the award is fair and reasonable.

In any case, the first defendant exercised his judgment as an advocate not to call evidence as to nursing care in a reasonably prudent manner; and

(c) at all material times, the defendants had preserved the plaintiff's right of appeal.

[17] Finally, the defendant took the position that the settlement sum of RM4m paid by the plaintiff to Syamsul, did not cause the plaintiff any loss as it is within the expected 'insured loss' of the plaintiff as the insured's insurer in the Seremban Suit.

Summary of the plaintiff's submission

[18] It is the plaintiff's case that they had pleaded the breach of retainer with particulars as follows:

(a) the defendants failed to comply with cl 7.2 and item 8, No 2, that is to inform the plaintiff of the hearing on 02 June 2017 by uploading 'Immediate Advise Of Proceeding' (IAP) in Merimen within two working days;

(b) the defendants failed to obtain a second opinion together with a quotation with regard to nursing care, in accordance with the SOP, Schedule 8, item No 3;

(c) the defendants failed to comply with cl 7.2 and item 8, No 2, by not in informing the plaintiff of the hearing on 20 June 2017, by uploading 'Immediate Advise Of Proceeding' (IAP) within two working days;

(d) the defendants failed to inform the plaintiff of the sessions court's decision given on 1 August 2017; and

(e) the defendants failed to obtain the plaintiff's instructions to file an appeal against the decision of the sessions court given on 1 August 2017.

[19] It is also the plaintiff's case that the particulars of the implied terms of the retainer breached by the defendants are as follows:

(a) failing to comply with the SOP — Schedule 8 annexed to the Service Level Agreement For Solicitors, dated 18 January 2016,

(b) failed to protect the plaintiff's interest; and

(c) failed to exercise their skill in advising the plaintiff and in conducting the case in court based on the professional standards of solicitors.

[20] Based on the above breaches, the plaintiff had pleaded the following particulars of negligence as against the defendants:

(a) failure to serve the notice of appeal and the appeal records on the solicitors for the plaintiff, with regard to the decision of the sessions court dated 1 August 2017, within time;

(b) failure to call the Saiful to give evidence during the said trial;

(c) failure to challenge the evidence of Syamsul with regard to the damage to the vehicle which was inconsistent with the version given by the plaintiff, the sketch plain and the key in Sessions Court Suit No A53KJ-502–12 of 2016;

(d) failure to put to the defendant's material issues with regard to liability;

(e) by calling Dr Ramnan as a witness for the defendant, to support the plaintiff's case despite the plaintiff having failed or neglected to give evidence in respect of cost of care of the plaintiff in a private hospital;

(f) failure to inform the plaintiff of the judgment given on 1 August 2017 and yet still requesting for a mandate from the plaintiff to settle the case after the said judgment;

(g) filing the notice of appeal in the High Court against the decision of the sessions court dated 1 August 2017 without the plaintiff's instructions or informing the plaintiff that the notice of appeal had been filed;

(h) failure to inform the plaintiff and to obtain the plaintiff's instructions at every stage of the proceeding; and

(i) by calling a representative from the nursing care centre as a witness to prove in support of the plaintiff's case.

[21] It is the plaintiff's contention that the evidence adduced at the trial had established the following facts:

(a) the first defendant, as a partner of second defendant, conducted the said case for the plaintiff and knew his obligations, as provided for in the 'SLAS';

(b) the first defendant, only informed the plaintiff of the hearing date fixed 26 May 2017, by way of immediate advice of proceedings (p 59 Bundle B). Informing of hearing date by way memorandum, is not in accordance with the SLAS;

(c) the first defendant did not call Saiful to give evidence in the Seremban Suit. In fact the first defendant did not even inform Saiful of the hearing date;

(d) the first defendant in conducting the trial, did not cross examine Syamsul sufficiently and put the defendant's case to him;

(e) the first defendant called as a witness, Dr Ramnan ('SD1') the General Manager of Columbia Asia Extended Care Hospital to confirm that Syamsul needed care in institutional place, which would be about RM18,000 per month;

(f) the first defendant did not inform the plaintiff of the decision given by the Seremban Sessions Court on 1 August 2017;

(g) even after the decision of the sessions court on 1 August 2017 was given, the defendants continued to give the plaintiff the impression that the case was pending and was asked for a mandate to settle the suit;

(h) the defendants filed an appeal against the decision of the sessions court dated 1 August 2017, without the consent of the plaintiff; and

(i) the defendants failed to serve the notice of appeal and the record of appeal, on the Syamsul's solicitors, within time.

[22] As stated earlier, in order to mitigate damages, the plaintiff engaged the services of CSM, to take over conduct of the Seremban Suit from the second defendant. Upon being engaged, CSM filed an application for extension of time to serve the notice of appeal and the appeal record out of time.

[23] Faced with an application to strike out its application for extension of time to serve the notice of appeal and the appeal record out of time by Syamsul's solicitors, the plaintiff thru CSM compromised the Seremban Suit for a sum of RM4m comprising of RM360,000 as general damages and RM400,000 as cost. The plaintiff was advised to do so by CSM on the premise that they had a slim chance of success to obtain leave to file the notice of appeal and record of appeal out of time as they have not provided any cogent reasons for the delay except for an oversight by the plaintiff's previous solicitors (see *Tong Kim Soo v Torai Prospektif Sdn Bhd* [2019] MLJU 946).

[24] In this regard, the defendant's failure to file and serve the notice of appeal and record of appeal within the prescribed time had caused the plaintiff the 'loss of chance' in respect of succeeding at the appeal. The plaintiff takes the position that it had a strong chance of succeeding at the appeal. If there was no prospect of success, the plaintiff would not have appealed. It would be unethical to take up a weak and hopeless case to court knowing that there is no prospect of success (see the Court of Appeal decision in *Nyo Nyo Aye v Kevin Sathiaseelan a/l Ramakrishnan & Anor* [2020] 4 MLJ 380; [2020] 3 AMR 317).

[25] The plaintiff further contends that they had lost a valuable right to persuade the court hearing the appeal due to the negligence of the defendant, reliance placed on the following authorities:

(a) *Kong Thai Sawmill (MIRI) Sdn Bhd; Ling Beng Sung v Kong Thai Sawmill (MIRI) Sdn Bhd & Ors (No 2)* [1976] 1 MLJ 131;

(b) *Singapore Shooting Association and others v Singapore Rifle Association* [2019] SGCA 83; and

(c) *Tembusu Growth Fund Ltd v ACTAtek, Inc and others* [2018] 4 SLR 1213.

[26] Hence, the plaintiff took the position that they have successfully shown that there was negligence on the part of the defendant. This is in view of the fact that the defendants had not disputed that they owed a duty of care to the plaintiff and the fact that there was a retainer between them and the plaintiff. The defendant only disputes that there was a breach of such retainer.

[27] Lastly, the plaintiff contends that the nature of negligence committed by the defendant does not involve the issue of 'a judgment call' in the exercise of his conduct of the Seremban Suit. The conduct of the defendant went far beyond that realm.

The defendant's submission

[28] In summary, the defendant's answers to the plaintiff's allegations are that:

(a) the plaintiff did not suffer any loss which they would have incurred anyway by reason being that the damages paid by plaintiff in the Seremban Suit was commensurate. This is underscored by the concession made by PW1 that the plaintiff had placed a loss reserve of RM3m for the Seremban;

(b) the defendants did not cause the plaintiff any loss as it was the plaintiff who chose to compromise the Seremban Suit without the appeal being disposed; and

(c) the plaintiff's allegations are against 'counsel' and therefore the defence of limited 'immunity' as applied by Justice Abdul Hamid Embong in *Mohd Noor Dagang Sdn Bhd v Tetuan Mohd Yusof Endut* [2001] 5 MLJ 561 absolves any liability.

[29] It is the defendant's contention that the basis of the plaintiff's case that Saiful ought not to be found liable at all in the Seremban Suit, the result of which the plaintiff suffered losses in the sum of RM4m (being the settlement sum) and the legal fees paid to CSM, is flawed.

[30] In supporting its case that Saiful ought not to be found liable, the plaintiff contended as follows:

(a) the first defendant had breached his duty of care owed to the plaintiff by inter alia, failing to call Saiful to testify in the Seremban Suit;

(b) PW2 had testified that the version given by Saiful in his police report was more probable than that of Syamsul; and

(c) the non calling of Saiful, the Seremban Suit was badly impacted causing the plaintiff to negotiate a settlement.

[31] In response to the above submissions on the non calling of Saiful, the defendant replied as follows:

(a) the learned Seremban Session Court judge had found Saiful 100% liable. This was a finding of fact which the learned trial judge was entitled to make as the investigating officer had given evidence in Syamsul's favour;

(b) to succeed against the defendants here, the plaintiff has the legal burden to prove that it has 100% winnable case in the Seremban Suit. It is a fantasy to claim that the Seremban Suit was a dismissal case. Even a cursory glance at the police reports/sketch plan would indicate that even at best, the plaintiff's insured would be more to blame. Compounding this, it is disingenuous of the plaintiff to set a loss reserve of RM3m and to claim here that is a 'dismissal case' (see *Innoseal (M) Sdn Bhd v Messrs Nora SW Lam & Associates & Anor* [2016] MLJU 515 where Nazlan JC referred to the following judgment of Simon Brown LJ in *Mount v Barker Austin* [1998] EWCA Civ 277: 'The legal burden lies on the claimant to prove that in losing the opportunity to pursue his claim (or defence to the counterclaim) he has lost something of value ie that his claim (or defence) had a real and substantial rather than merely a negligible prospect of succuess.');

(c) it was the plaintiff's own pleaded case that the evidence of Saiful was crucial insofar as Saiful's defence/liability in the Seremban Suit is concerned. Despite taking this position and having named Saiful as the third witness. No reason was provided for his non calling. Adverse inference should therefore be invoked on the failure to call Saiful; and

(d) the accusation hurled against the first defendant for the calling or non calling of a witness is a judgment call to be made by counsel. There is no 'right' answer. It is possible that Saiful would have been a bad witness in the Seremban Suit. Whether Saiful, if he did testify, would have made a positive difference is mere speculation on the part of the plaintiff.

[32] Whilst PW1 had testified that the Seremban Suit was compromised based on the written advice of CSM, when questioned on the exact nature of the advice, PW1 invoked privilege. The plaintiff's second witness, PW2,

however disclosed that he had given an opinion the application for extension of time to serve the notice of appeal and appeal record out of time was almost certain to be dismissed because the only reason given was that there was an oversight. He was also of the opinion that the chance of success of the main appeal was slim and therefore a settlement should be attempted.

[33] However, during cross examination, PW2 agreed that in so far as an application for an extension of time is concerned, the factors a court would take into consideration are usually two folds: the length of the delay and the merits of the appeal, both of which was in the plaintiff's favour.

[34] It is the defendant's position that the plaintiff's had uplifted privilege of the legal advice and the failure to produce the said legal opinion attracts the presumption of adverse inference against the plaintiff.

[35] In so far the plaintiff's allegation that defendants had breached their duty of care and retainer as pleaded in paras 15(i) to (v) and 17(i) to (ix) of the statement of claim, the defendants concedes that:

(a) they did not inform the plaintiff of the decision in the Seremban SC Suit delivered on 1 August 2017 until September 2017 (see para 15(iv) of the statement of claim);

(b) they did not call Saiful to testify (see para 17(ii) of the statement of claim);

(c) they did not obtain the plaintiff's instruction to file an appeal against the Seremban SC decision and did not inform the plaintiff then that such an appeal has been filed (see para 15(v), 17(vii) and 17(viii) of the statement of claim); and

(d) they did not serve the notice of appeal and the appeal records within time (see para 17(i) of the statement of claim).

[36] Despite conceding so, the defendant contends that the aforesaid failures did not cause the plaintiff any loss for reasons set out below.

[37] In respect of the remaining particulars pleaded against the defendants, the defendant contended that the first defendants did:

(a) inform the plaintiff of the trial dates on 2 June 2017 and 20 June 2017 (see para 15(i) and (ii) of the statement of claim);

(b) request for a mandate for settlement purposes (see para 17(iv) of the statement of claim) vide his advice dated 26 April 2017 (at pp 51–58 of Bundle B) (see: TAB-L of the Core Bundle), Immediate Advice of Proceeding dated 26 May 2017 (at p 59 of Bundle B) (see: TAB-M of the

Core Bundle) and revised advice dated 16 June 2017 (at pp 60–66 of Bundle B) (see: TAB-N of the Core Bundle). It is pertinent to note that the plaintiff's own witness, PW2, agreed that the sentence in the defendants' opinions dated 26 April 2017 and 16 June 2017 'may we have your approval/instructions' was a request for a mandate to settle. Clearly, the fault for there being no mandate rests at the plaintiff's door;

(c) obtain a second opinion on quotation for nursing home (see: para 15(iii) of the statement of claim); and

(d) challenge Syamsul's evidence and his case in the Seremban SC Suit (see: para 17(iii) and (iv) of the statement of claim). Neither should DW1's explanation be underplayed, that 'it ought to be borne in mind that Syamsul's injuries were very serious and was giving evidence in an ambulance due to his condition. As counsel, I was also mindful that any overly hostile/aggressive cross examination of Syamsul would not only be unbecoming but also have the effect of evoking more sympathy from an already sympathetic judge. I would also say that much of what counsel decides to do in trial in terms of strategy is a judgment call.' As a matter of policy, the law ought to allow counsel to make judgment calls without penalizing them just because the outcome is poor — otherwise, this will open the floodgates.

[38] As for the plaintiff's argument that the defendants have breached their duty by calling a witness, being Dr Ramnan of Columbia Asia Extended Care Hospital because it amounted to supporting Syamsul's case (see: para 17(v) and (ix) of the statement of claim), the first defendant testified that:

(a) as Syamsul was actually warded at Columbia Asia Extended Care Hospital, the award for nursing care based on this fact is fair and reasonable. Also because of this, he exercised his judgment as counsel not to call evidence from Infinite as to nursing care;

(b) from his experience, Columbia Asia Extended Care Hospital's quote was not unreasonable as he has acted in many cases involving the issue of nursing care;

(c) further, he also made a judgment call as counsel to call Dr. Ramnan to testify to obtain the following evidence:

(i) that Syamsul's condition has been improving which will result in a reduction in the costs of nursing care; and

(ii) most of the accident victims admitted to Columbia Asia Extended Care Hospital will be discharged thereafter.

[39] In respect of the plaintiff's argument that the defendants have breached their duty by failing to call Saiful to testify in the Seremban Suit (see: para 17(ii)

and (ix) of the statement of claim), the first defendant testified that he has made a judgment call as counsel not to call Saiful to testify because:

(a) based on Saiful's police report lodged on the same day of the accident on 18 May 2016, upon noticing the problem with his car's engine, he stopped at the emergency lane instantaneously to check the engine. Saiful did not mention that he has given any signal/warning at all and checked his rear-view mirror before switching to and stopped at the emergency lane. Syamsul, who was riding a motorcycle, collided into his car from the rear even before Saiful alighted from his car to check the engine (see: Saiful's police report at p 116 of Bundle B);

(b) based on the investigation result by the investigating Officer of the Traffic Department, Mantin, Saiful was convicted/summoned under s 43(1) of the Road Transport Act, 1987 (see: investigation result at p 125 of Bundle B); and

(c) further, the investigating officer testified as Syamsul's witness (see : investigating officer's testimony at pp 224–230 of Bundle B) that:

(i) based on Saiful's police report, he did not mention that he has given any signal/ warning at all and checked his rear-view mirror before switching lane and only stated that the stopped at the emergency lane instantaneously.

(d) the engine of Saiful's car did not have any problem and was functioning; and

(e) Saiful was also summoned under r 16 of the Road Traffic Rules 1959 and had paid the summons.

COURT'S ANALYSIS AND FINDINGS

[40] To begin my analysis, I have categorised Encik T Gunaseelan, learned counsel for the plaintiff's submission into three different headings:

() factual allegations that were not pleaded;

() breaches related to non-compliance of the SLA; and

() breaches related to the handling the Seremban Suit;

Factual allegations that were not pleaded

[41] On this issue, it is the plaintiff's allegation that the defendants failed to object to the investigating officer ('IO') giving evidence by referring to the

investigation results which stated that Saiful was summoned/convicted under s 43(1) of the Road Transport Act; and that the defendants failed to adduce evidence on the nursing care quotation obtained by the defendants for purposes of comparison with the nursing care quotation from Columbia Hospital.

[42] Having scrutinised the statement of claim, it is my finding that the plaintiff did not plead these two breaches in the statement of claim (see para 15–17 of the statement of claim). I take the firm view that it is a cardinal principle of litigation that parties are bound by its pleadings (see Federal Court's decision in *See Leong Chye @ Sze Leong Chye & Anor v United Overseas Bank Bhd* [2019] 1 MLJ 25). As these matters were not of the plaintiff's pleaded case, I do not propose to consider them in the course of my decision and it is useful for me to quote the case of *Menah Sulong v Lim Soo & Anor* [1983] 1 CLJ 26 *where the Federal Court held that:*

> I think it is necessary in this case to emphasize once again that the court should give their decision in strict compliance with the pleadings.

Breaches related to non compliance of the SLA

[43] With reference to the defendant's purported breach of the SLA, the particulars of breach involves:

(a) the defendants failure to inform the plaintiff of the hearing date of the Seremban Suit using the 'Immediate Advice on Proceedings' mode provided under the SLA. The fact that the defendants did informed the plaintiff of the hearing date vide a Memorandum dated 16 June 2017 (see tab N at page 60 of the defendant's Core Bundle) does not absolve the defendants from liability as the terms of the SLA requires strict compliance;

(b) the defendants failure to inform the plaintiff of the decision in the Seremban Suit;

(c) the defendants failed to obtain the plaintiff's instructions to file the notice of appeal against the sessions court decision in the Seremban Suit; and

(d) the defendants failure to serve the notice of appeal and Record of Appeal on the solicitors for Syamsul (as the plaintiff in the Seremban Suit) within the time prescribed under the Rules of Court 2012;

[44] At this juncture, it would be appropriate for me to set out the principle ingredients of the tort of negligence. For this purpose, I can do no better that refer to the case of *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals* [2003] 1 MLJ 567 at p 578, wherein the Court of Appeal

identified the key elements for a cause of action based on negligence, where Gopal Sri Ram JCA (as he then was) stated as follows:

> To make out a case against a defendant in the tort of negligence, a plaintiff must establish four ingredients. First, he must show that he was owed a duty by the defendant to take reasonable care. Secondly, that the defendant breached that duty, third, that the resultant breach caused the harm in question and fourth, that he (the plaintiff) suffered damage that is not too remote.

[45] Based on the principles set out in the above Court of Appeal decision, I can safely conclude that under the SLA, the defendants does owe the plaintiff a duty of care. I can also conclude that the defendant's failures as listed at para [43] above, amount to a breach of that duty of care.

[46] Despite such findings, I am however unable to conclude that the defendants failure:

(a) to inform the plaintiff of the hearing date of the Seremban Suit using the 'Immediate Advice on Proceedings' mode provided under the SLA. The fact that the defendants did informed the plaintiff of the hearing date vide a Memorandum dated 16 June 2017 (see tab N at p 60 of the defendant's Core Bundle) does not absolve the defendants from liability as the terms of the SLA requires strict compliance;

(b) to inform the plaintiff of the decision in the Seremban Suit; and

(c) the defendants failed to obtain the plaintiff's instructions to file the notice of appeal against the sessions court decision in the Seremban Suit. had caused harm or damage to the defendant. To my mind the above acts of the defendants had no nexus with the damage suffered by the plaintiff. It has to be stated that plaintiff themselves failed to take note of the trial date no revert to the defendant's request for mandate for settlement purposes.

[47] In fact, it is my finding that the defendants act in filing the notice of appeal against the sessions court decision albeit without instructions from the plaintiff was favourable and in the interest of the plaintiff. This obviously led to the plaintiff withdrawing their allegation on this matter on the very first day of trial.

[48] In respect of the defendants failure to serve the notice of appeal and record of appeal on the solicitors for Syamsul (as the plaintiff in the Seremban Suit) within the time prescribed under the Rules of Court 2012, the following facts are crucial to my analysis:

(a) the notice of appeal and appeal record for the Seremban Suit were filed within time. It was only the service of the same which were done out of time (see para 17(i) of the statement of claim);

(b) the notice of appeal was served two days late. The letter to Syamsul's solicitors informing of the appeal also did not include the requisite notice of appeal. Prior to serving the notice of appeal by courier, there is evidence that second defendant did attempt to fax the said notice of appeal. This attempt was unsuccessful. The print out by the defendant's fax machine is evidence of this fact;

(c) the appeal record was served six days late. It must be noted that the second defendant's firm is situated in Petaling Jaya, Selangor; whilst Syamsul's solicitors is situated in Ipoh, Perak;

(d) the plaintiff had compromised the Seremban Suit as they were advised by CSM that the chances of obtaining leave to file the notice of appeal and appeal record out of time were slim. This resulted in the plaintiff settling the Seremban Suit by payment in the sum of RM3.6m as damages and RM400,000 towards cost. To the plaintiff, this was done to mitigate its losses after the Seremban Sessions Court had awarded a sum of RM4,999,309 to Syamsul at the conclusion of the trial; and

(e) the plaintiff took the position that as a result of the defendants failure in respect of the notice of appeal and appeal record, the plaintiff lost a valuable right to persuade the Court of Appeal to arrive to a different conclusion on the Seremban Suit. The plaintiff contends so in light of the memorandum which was very carefully drafted in the memorandum of appeal by the first and/or second defendant.

[49] Upon reviewing the submission of both parties on this issue, my findings are set out below:

(a) firstly, whilst there was failure by the defendants to serve the notice of appeal and record of appeal within time, the failure was not deliberate as it was due to by error on the part of the clerk in charge of the matter. This in my opinion did not cause the plaintiff's loss;

(b) secondly, the plaintiff's decision to compromise the Seremban Suit was based on the advice of CSM that the chances of succeeding obtaining leave to file the notice of appeal and appeal record out of time were slim. I am of the view that the advice given by CSM to the plaintiff that the chances of succeeding obtaining leave to file the notice of appeal and appeal record out of time were slim was not entirely correct;

(c) in this regard, there are number of factors which the court will look at in determining whether such an application will be allowed or dismissed. Such factors would include the length of the delay, the reason for the

delay and whether there are merits in the appeal. This fact was duly acknowledged by PW2 who had on almost occasions agreed with a number of propositions by the Mr Wong Hock Mun on this issue, (see pp 103–105 of the notes of evidence dated 17 January 2020 at pp 109 and 111):

Q: The factors a court would take into consideration in so far as extension of time is usually two fold isn't it? Length of the delay and the merits of the appeal?

A: Yes, correct. And the reason for the delay.

Q: When you formed the opinion at that time and you remained of that opinion now that the application is bound to be dismissed, yes? I presume you thought they were no merits in the case?

A: In the case you are referring to, is it the merit of the application or the appeal?

Q: In the appeal.

A: No. I don't think so. The appeal had merits.

Q: So in other words, merits in so far of the appeal would have supported the application? The notice, the extension of time application?

A: Yes

Q: So why, I put it to you, if there were merits in the appeal. And that would have supported the application for extension of time ... I just repeat the question. You have agreed with me, merits of the appeal is relevant to the application for extension of time?

A: Yes.

Q: The more the merits it is, you agree with me, the more support it is for the extension of time application?

A: Correct.

Q: Now you tell me that there are merits in the appeal?

A: Yes.

Q: So, my obvious question to you is, then it is not obviously bound to fail, do you agree?

A: I think weighing the merits... I am not saying that it would certainly ...

Q. Please answer the question. I have asked you, you have

reinforced it. You say your opinion was it was bound to fail. Those were very strong words. I have asked you and you have agreed. Now, in light of what I have just said to you, recited to you, those 3 factors I put it to you that it is not bound to fail?

A: I disagree.

At p 109:

Q: I say to you, the letter which was supposed to enclose the notice of appeal was served 2 days late. Let's assume, if true the notice of appeal was not enclosed. However the other side would have known that appeal was being proffered. So, it was 2 days late but they knew that the appeal was being proffered. And I am putting to you that such based on those fact, an application for extension of time is not bound to fail?

A: On its own yes, it would not, on its own, bound to fail.'

At page 111:

Q. Let's see what the other side says, it is at page 24. Right at the top (iii). 'Rekod rayuan juga tidak disampaikan kepada peguam saya dalam jangkamasa yang ditetapkan di bawah undang-undang. Peguam saya hanya menerima rekod rayuan pada 20.09.2017.' As I have said, I will take you to it, so Mr. Hari's assumption was correct. It was received on the next day. Sent on the 19/09 and received on the 20/09. It's acknowledged. So, you are right the record of appeal was served late. It was served 6 days late, correct?

A: Yes

Q: By all accounts 6 days late is not ... a countless delay isn't it?

A: No, it is not.

Q. So, let's take it together. I am putting it to you notice of the appeal was given 2 days late. Record of appeal was served 6 days late. They were merits in the appeal. I put it to you it was not bound to fail?

A: I disagree.

(d) thirdly, based on the above testimony of PW2, to say that the application for extension of time filed in the Seremban Suit is hopeless simpliciter as put by the plaintiff and therefore they had to compromise the Seremban Suit is wrong. In this regard, I would have to agree with the reply submission of the defendants dated 30 October 2020 (see para 4.2).

In the same breath, I need only to refer to the judgment of Sri Ram JCA (as he then was) in the case *Tenaga Nasional Berhad v Prorak Sdn Bhd* [2000] 1 MLJ 479 where His Lordship stated as follows:

This case demonstrates the terrible harm that may be visited upon the litigant's head because of his solicitor's mistake. We hasten to add that the solicitor concerned is no longer on record in the proceedings before us.

Whenever possible, where there is no risk of sacrifice of principle in the name of justice or at the altar of convenience, we do our best to ensure that a lay client does not suffer because of the mistake of his legal advisers. We do so in the interests of justice. When we act, we always bear in mind what Lord Denning said in *Doyle v Olby (Ironmongers) Ltd* [1969] 2 All ER 119 at p 121:

> We never allow a client to suffer for the mistake of his counsel if we can possibly help it. We will always seek to rectify it as far as we can. We will correct it whenever we are able to do so without injustice to the other side. Sometimes the error has seriously affected the course of the evidence, in which case we can at best order a new trial.

[50] In my final analysis, given the background that the plaintiff themselves agrees that there were merits in the appeal (see evidence of PW2 at para [48] above) and that the delay in serving the notice of appeal and appeal record was only a mere number of days, it was the plaintiff's own decision to compromise the suit that led to it suffering the loss of RM4m. The situation might have however been different had the plaintiff chosen to proceed with the said application for extension of time and loss. As it stands, I take the view that the chain of causation in so far the losses suffered by the plaintiff in this case had been broken by the compromise of the Seremban Suit. In other words, I cannot agree with the plaintiff's contention that the negligence of the defendants had caused them a loss of chance to ventilate their case at the appeal stage.

Breaches related to the handling the Seremban Suit

[51] In view of my findings on the issues in relation to the breaches related to non-compliance of the SLA, it is no longer necessary for me to decide on the issue involving the purported negligence of the defendant in the handling of the Seremban suit.

[52] Be that as it may, in passing I wish to say a few things with reference to the defence of limited immunity forwarded by the defendants based on the decision of Abdul Hamid Embong J in the case of *Mohd Noor Dagang Sdn Bhd v Tetuan Mohd Yusof Endut,* where the plaintiff therein suit the defendant, as its retained advocate and solicitor, alleging negligence on both acts preparatory to the trial and the omission of the defendant in court for failing to call witness and adducing documents as evidence in defending the suit against the plaintiff in the Temerloh High Court.

[53] The issues to be decided there were:

(a) whether the defendant had informed the plaintiff of the new hearing date of the Temerloh suit;

(b) whether the defendant had been negligent in reminding the plaintiff of the hearing date? and

(c) whether the defendant had been negligent in its preparation of a reasonable defence in the Temerloh suit by failing to file the relevant documents or to produce the plaintiff's witnesses at the trial?

[54] Having referred to the House of Lords' decision in *Rondel v Worsley* [1967] 1 QB 443 and *Saif Ali & Anor v Sydney Mitchell & Co (a firm) & Ors* [1980] AC 198, where the latter decision held that a barrister is accorded such limited immunity in the course pre-trial work (although not covering an advice given by the barrister on the facts of the case) and conduct of the litigation of a case in court, the learned judge took cognisance of statutory protections against civil actions or prosecutions accorded to participants in a court proceeding which were founded on grounds of public policy. There would also be instances where the common law accords the necessary protection to an advocate and solicitor with a limited immunity blanket in the exercise of his function in attending to a cause or proceeding in court. Such immunity is necessary on public policy considerations having regard to the following factors:

(a) the consideration that a proper administration of justice may not be achieved if barristers are inhibited by the fear of being sued for negligence by a disgruntled client at the expense of exercising the duty he owes to the court;

(b) the public interest consideration in that issues already decided at a trial may have to be re-litigated in the ensuing negligence suit between the client and his barrister to establish the negligence and damage flowing; and

(c) the existing general immunity attached to all other participants in proceedings before a court vis judges, court officials, witnesses or parties based on public policy to ensure that trials are conducted without the stress and fear on the part of those participants, not for their benefit but in the higher interest of the advancement of justice.

[55] Based on the facts and the evidence before the court, the learned judge found that defendant had succeeded in establishing the defence of limited immunity.

[56] Interestingly, the defence of limited immunity is no longer available in the UK courts following the House of Lord's decision in *Hall (Arthur JS) & Co v Simons* [2002] 1 AC 615. Reading the judgment of Lord Millet and Lord Hoffman, it can be observed that much of rationale for the decision involved the coming in of the Human Rights Act 1998 and the application of article 6 of the European Convention for the Protection of Human Rights and Fundemental Freedom pursuant to Britain joining the European Convention on Human Rights. Although Scotland is part of the UK, it still continues to recognize the defence of limited immunity but only in matters relating to criminal proceedings (see *Wright v Paton Farrell* [2007] PNLR 7).

[57] The courts in continent of Australiasia is however divided. Whilst the

Supreme Court of New Zealand no longer accepts such a defence (see *Lai v Chamberlains* [2007] 2 NZLR 7), the High Court of Australia (being the apex court of Australia) however continues to accept such a defence as held it *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 214 ALR 92 and later on *Atwells v Jackson Lalic Lawyers Pty Limited* [2016] HCA 16.

[58] Closer to home, Singapore is no longer supportive to such a defence on the basis that public considerations as stated in *Rondel v Worsley* do not apply in Singapore. This was held in *Cheong Yeo & Parter & Anor v Guan Ming Hardware & Engineering Pte Ltd* [1997] 2 SLR 30.

[59] As far as Malaysia is concern, the decision of Abdul Hamid J (as His Lordship then was) in *Mohd Nor Dagang*, was duly followed Awang Armadajaya JC in the case of *Messrs Shahinudin & Ranjit v Ravichantiran a/l Ganesan* [2020] MLJU 846. It also has to be stated that in *Sri Alam Sdn Bhd v Tetuan Radzuan Ibrahim & Co (sued as a firm)* [2010] 1 MLJ 284, Harminder Sigh JC (now FCJ), the court chose to follow the rationale taken by the House of Lords in *Arthur JS Hall & Co v Simons* which held that there is no immunity in civil proceedings and that public policy considerations were no longer persuasive in criminal proceedings.

[60] Having scrutinised the authorities on this issue of limited immunity ie with reference to acts preparatory to and are intimately connected to the conduct of a suit, I find myself incline to follow the approach adopted by the Australian and New Zealand Courts based on the original raitionale of the House of Lords in *Saif Ali* as followed in the case of *Mohd Nor Dagang*.

[61] To my mind, whether such a defence is applicable would entirely depend on the facts of the case and the evidence adduced at the trial proper. *Ipso facto*, door to defence of limited immunity should not be shut to achieve justice and to uphold public policy. Without it advocates and solicitors would decline to represent individuals who are in great need of legal representation in court and to handle cases particularly involving citizens of the lower income group who more often than not cannot afford to pay average legal fees. This is due to fear that their exposure will be higher than the returns in accepting such legal brief.

CONCLUSION

[62] In the above premise, I am constraint to hold that on the plaintiff had failed to prove their case on a balance of probability.

[63] Having heard brief submissions by counsel on the issue of costs, I am of the view that a sum of RM50,000 (subject to allocator) is fair and reasonable. I hereby order so accordingly.

Claim dismissed with costs.

Reported by Mohd Kamarul Anwar